No. 12-____

IN THE

# Supreme Court of the United States

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

*Petitioner*,

v.

ELIZABETH E., BY AND THROUGH HER PARENTS, ROXANNE B. AND DAVID E.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act requires a school district to pay for a residential placement that is required to treat a child's mental illness.

## PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Tenth Circuit:

1. Jefferson County School District R-1, petitioner on review, was the plaintiff-appellant below.

2. Elizabeth E., respondent on review, was the defendant-appellee below.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner Jefferson County School District R-1 is a public school district in Colorado. Petitioner has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent or greater ownership interest in petitioner.

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## PETITION FOR A WRIT OF CERTIORARI

Jefferson County School District R-1 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The Tenth Circuit's opinion is reported at 702 F.3d 1227. Pet. App. 1a-35a. The district court's opinion is reported at 798 F.Supp.2d 1177. Pet. App. 36a-66a. The opinion of the state administrative law judge is unreported. Pet. App. 67a-148a. The opinion of the independent hearing officer is unreported. Pet. App. 149a-203a.

## JURISDICTION

The Tenth Circuit entered judgment on December 28, 2012. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The relevant portions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, are reproduced at Pet. App. 204a-211a.

## INTRODUCTION

This case raises the question of whether federal law requires a public school district in Colorado to pay for one of its students to live at an out-of-state private residential facility that costs substantially more than an Ivy League university. Respondent Elizabeth E. is a child with severe mental health problems who is identified as a student with a disability under the IDEA. She attended school in Colorado for many years, first at public schools within Jefferson County School District R-1 and then later at a special private school of her parents' choosing where her tuition was covered by the District. Her parents grew increasingly concerned about her violent behavior, however, and unilaterally moved her to a hospital in Utah and subsequently to an expensive residential treatment center in Idaho. When the District refused to pay for Elizabeth's placement at the residential treatment center, her parents sued for reimbursement under the IDEA.

The circuits have struggled for years to delineate the boundaries of school districts' obligation to provide their students with a free appropriate public

education in cases where the child's mental health needs require the child to be placed at a residential facility. Many circuits require school districts to pay for the residential placement in a case like Elizabeth's, where the placement may facilitate learning by mitigating the child's mental health problems. Other circuits take a narrower view, though they disagree about what test to employ. Recognizing that the IDEA trains its eye on the educational needs of disabled children, those circuits have held that school districts need not pay if the placement was necessitated by the child's mental health needs or if the placement would have been necessary notwithstanding the child's educational needs.

In this case, the Tenth Circuit acknowledged these various tests. But it ultimately rejected all of them, choosing instead to mint its own test. Applying that new test, the Tenth Circuit concluded that the District had to pay for Elizabeth's costly residential placement simply because the facility in Idaho also had an accredited school that provided some instruction to Elizabeth during the day. That decision goes well beyond even the most permissive test adopted in other circuits, and dramatically expands school districts' already-expansive liability under the IDEA. The Tenth Circuit's decision also exacerbates the deep and widely-recognized circuit split.

This Court should grant the petition to establish uniformity in this important area of federal law, and to correct the Tenth Circuit's unjustifiably expansive interpretation of the IDEA.

## STATEMENT

### A. The Statutory Framework

Congress enacted the IDEA under the Spending Clause to improve educational opportunities for children with disabilities. In return for federal funds, Colorado and other states agreed to assume certain legal obligations relating to the education of disabled children. The statute's core mandate requires states to make a "free appropriate public education" available to all children with disabilities residing within their borders. 20 U.S.C. § 1412(a)(1)(A). A free appropriate public education has two components: "special education" and "related services," both of which must be made available to the student "without charge." 20 U.S.C. § 1401(9).

"Special education" is instruction that is specially designed to meet the unique needs of the child. 20 U.S.C. § 1401(29). As other statutory provisions and the decisions of this Court make clear, that instruction is supposed to address the child's *educational* needs, not other needs that might arise in connection with her disability. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(II); *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 206-07 (1982). For example, an academically gifted child who is confined to a wheelchair might be entitled to a wheelchair-accessible classroom under the Americans with Disabilities Act, but that student would not need the specialized instruction guaranteed by the IDEA. This Court also has held that the specialized instruction required by the statute need not maximize a child's educational potential; it need only be reasonably calculated to confer some educational benefit on the child. *Rowley*, 458 U.S. at 206-07.

In addition to providing special education to disabled children, states also must provide "related services." That term refers to supportive services necessary for the child to benefit from special education. 20 U.S.C. § 1401(26). The Court has held that services such as continuous nursing care and clean intermittent catheterization count as related services if they allow the child to remain at school during the day. *See Cedar Rapids Cmty. Sch.* v. *Garret F.*, 526 U.S. 66, 73 (1999); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 893 (1984).

When the local school district fails to make a free appropriate public education available, the parents may enroll their child in private school and seek reimbursement from the school district. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); *Florence Cnty. Sch. Dist.* v. *Carter*, 510 U.S. 7, 14-15 (1993); *Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 369 (1985). Such reimbursement is allowable if—but only if—the private school placement was " 'proper' " under the IDEA. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 231 (2009) (quoting *Carter*, 510 U.S. at 15). As the decision below reveals, courts have split dramatically in providing standards to evaluate when such placements are "proper."

### B. Elizabeth's Mental Illness

In this case, the student at issue, Elizabeth, suffers from a broad range of psychiatric and mental health problems. Over the years, her diagnoses have included reactive attachment disorder, a bipolar affective disorder, and possible schizophrenia. Pet. App. 166a. Consistent with these diagnoses, Elizabeth has a long history of conflict and physical aggression toward her family members. Her parents

have admitted her to psychiatric hospitals on many occasions because of her severe rages and out-of-control behavior at home. Pet. App. 150a-151a. She also has been identified as a child with a disability under the IDEA since 1999. Pet. App. 110a.

Elizabeth attended public school in the District from 2000-2006. During that time, the District provided her with special education pursuant to an individualized education program developed by her teachers and parents. In 2006, however, Elizabeth's parents became dissatisfied with Elizabeth's placement and alleged that the District was not meeting its obligations under the IDEA. Pet. App. 111a. To resolve that dispute, the District agreed to pay half of the cost of Elizabeth's attendance at Humanex Academy, a private school selected by her parents, for the 2006-2007 school year. Pet. App. 111a. The parties entered into similar agreements for the 2007-2008 and 2008-2009 school years, with the District agreeing to pay the full amount of Elizabeth's tuition. Pet. App. 111a-112a.

Just as the District was preparing for Elizabeth's triennial reevaluation in 2008, and without any warning, Elizabeth's parents unilaterally moved her from Humanex to the Aspen Institute for Behavioral Assessment, an acute inpatient psychiatric hospital located in Utah. Pet. App. 112a-113a, 163a. The parents told the Aspen Institute that they were admitting Elizabeth to address her "[o]ngoing violent behavior in the home, and total lack of interest in working with a therapist or anyone else." C.A. App. 636. The parents told the District about the move six days after it happened, saying Elizabeth would probably stay at the Aspen Institute for 6 to 8 weeks

while the facility's staff assessed her condition and determined where she should go next. Pet. App. 41a.

The District became concerned about paying tuition at Humanex for an empty seat, and accordingly stopped payments after Elizabeth's admission to the Aspen Institute. Pet. App. 41a. Before doing so, however, the District received assurance from Humanex that space would be available for Elizabeth if she returned. C.A. App. 2459-60.

Nearly three months after Elizabeth's admission to the Aspen Institute, her parents notified the District that they planned to move Elizabeth to Innercept, a residential treatment facility located on a ranch in Idaho. Pet. App. 42a. They informed the District that they intended to seek reimbursement for the cost of her placement there, which at the time was $9,800 per month. C.A. App. 809. The District responded that it would not cover those costs but that it stood ready, willing, and able to provide Elizabeth with a free appropriate public education upon her return to Colorado. Pet. App. 42a. But Elizabeth's parents made clear to the District that they had no intention of returning Elizabeth to Colorado. They enrolled Elizabeth at Innercept shortly thereafter.

### C. The Proceedings Below

Elizabeth's parents initiated state administrative proceedings in 2009 to seek reimbursement for the cost of Elizabeth's placement at Innercept. One of the key issues at the administrative hearing was whether Elizabeth's placement at Innercept was necessitated by her mental health issues or by her educational needs. All of her treating psychiatrists and psychologists agreed that it was the former. For example, her neuropsychologist at the Aspen

Institute testified that neither Elizabeth's learning disorder, nor her academic performance, cognitive functioning (IQ), executive functioning, attention, concentration, motor functioning, lateral dominance, visiospatial processing, learning, or memory warranted a residential placement. C.A. App. 1380-82, 1388-89. Elizabeth's psychiatrists at the Aspen Institute and Innercept likewise confirmed that her need for clinical and psychiatric care was the impetus for recommending a residential treatment center. C.A. App. 1582, 1692-93, 1709-10.

There was wide agreement among Elizabeth's medical and mental health providers that Elizabeth's mental health issues necessitated her admission to Innercept. Pet. App. 56a. They also agreed that her academic performance was likely to improve in a residential setting that could provide clinical care in a therapeutic setting. Elizabeth had made satisfactory educational progress at Humanex, but her mental health issues prevented her from achieving her full potential. Pet. App. 111a-112a. Her providers agreed that Innercept would provide a better environment because it would likely improve Elizabeth's mental health overall. As one provider put it, "when she is doing better with her mental health, she starts to function better in the classroom." Pet. App. 53a.

After the parties presented their evidence, the state hearing officer concluded that the District had failed to make a free appropriate public education available to Elizabeth. In the hearing officer's view, the District should not have withdrawn Elizabeth from Humanex while she was in Utah. The officer viewed that withdrawal as a denial of a free appropriate public education under the IDEA—

even though Elizabeth was not actually attending Humanex at the time and was assured a spot when she returned to Colorado. Pet. App. 177a-179a.

The hearing officer also considered whether the District was obligated to cover the cost of Elizabeth's placement at Innercept. The District had argued that Elizabeth's placement at Innercept was driven by her mental health needs rather than her educational needs. But the hearing officer rejected that distinction, finding that Elizabeth's "mental health and emotional problems simply cannot be separated from her educational needs." Pet. App. 200a. If Elizabeth had a psychotic break, he observed, "that event would surely have a negative impact on her ability to benefit from her education." Pet. App. 200a. Thus, because the placement at Innercept improved Elizabeth's chances of learning by remediating her underlying mental health needs, the District had to pay for it under the IDEA.

The District appealed the hearing officer's order to a state administrative law judge and then to the federal district court. The order was affirmed at both stages. The district court recognized that the federal courts of appeals were divided over how to determine whether a residential placement is reimbursable under the IDEA. Pet. App. 48a-52a. It declined to take sides in that dispute, concluding that Elizabeth's placement was reimbursable even under the District's test. Pet. App. 52a.

That conclusion, however, was possible only because the district court distorted the District's proposed tests. Those tests, which come from the Ninth Circuit's decision in *Clovis Unified School District* v. *California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) (per curiam), the Seventh

Circuit's decision in *Dale M.* v. *Board of Education*, 237 F.3d 813 (7th Cir. 2001), and the Fifth Circuit's decision in *Richardson Independent School District* v. *Michael Z.*, 580 F.3d 286 (5th Cir. 2009), focus on the reason for the residential placement—allowing reimbursement when the placement is necessitated by the child's educational needs but denying reimbursement when the placement would have been necessary "quite apart from" those needs. The district court summarily dispensed with those tests, saying that the "crucial issue is not the initial motivation behind the placement, but instead whether the education provided by the private school is reasonably calculated to enable the child to receive educational benefits." Pet. App. 56a (quotations omitted). Because the instruction provided at Innercept fit that description, the District had to pay for the entire placement.

The Tenth Circuit affirmed. Like the district court, the court of appeals acknowledged the split among the circuits. Pet. App. 10a-14a. The District urged the court to adopt the Ninth Circuit's test, which would have focused the inquiry on whether Elizabeth's placement at Innercept was necessary "quite apart from" her educational needs. *Clovis*, 903 F.2d at 643. As the District pointed out, the Ninth Circuit had denied reimbursement under that test in a case with very similar facts to this one. *See Ashland Sch. Dist.* v. *E.H.*, 587 F.3d 1175 (9th Cir. 2009). But the Tenth Circuit ignored the District's proffered test, characterizing the confusion among the circuits as a two-way split rather than a three-way split (as the District had done) or a four-way split (as the district court had done). *See* Pet. App. 14a-16a.

Having artificially narrowed the field of potential tests, the Tenth Circuit concluded that none of them were suitable and devised an entirely new four-part test of its own. Pet. App. 16a-22a. Under that test, a school district must pay for a private residential placement if:

(1) It fails to provide the child with a free appropriate public education;

(2) The child is placed at a state-accredited elementary or secondary school; and

(3) The school provides individually designed instruction to the child.

Pet. App. 18a-19a. A fourth prong limits the scope of an otherwise allowable reimbursement: If the school provides additional services beyond special education, those services are reimbursable if they can be characterized as "related services" under the IDEA. Pet. App. 19a-20a.

Applying this test of its own creation, the Tenth Circuit concluded that the District had to pay for Elizabeth's placement. The court observed that Innercept had an accredited educational program and that Elizabeth is supposed to receive several hours per day of traditional classroom instruction. Pet. App. 23a. It considered those bare facts sufficient to satisfy the second and third prongs of its test. As for the fourth prong, the Tenth Circuit noted testimony that Elizabeth's placement at Innercept would likely improve her educational performance and that her educational needs could not be addressed without also addressing her mental health needs. The District objected that it should not be responsible for the placement because Elizabeth "would have required mental health services regardless of whether

she was receiving educational services." Pet. App. 24a. But the Tenth Circuit was unmoved; all that mattered, in its view, was that Innercept *also* provided specialized instruction and related services. Pet. App. 24a-25a.

Judge Gorsuch concurred only in the judgment. He recognized the "copious competing tests already circulating among circuit courts" and praised the majority for "stirring the pot." Pet. App. 33a. But he also found fault in the majority's new test. As he pointed out, other circuits had held that "a private placement under IDEA is permissible *only* if it is necessary to supply the child with a meaningful *educational* benefit the public school has proven unable or unwilling to supply—not to address purely social, emotional, or medical needs." Pet. App. 34a. The majority's test, he worried, could be read to go beyond that fundamental principle. He would therefore have concluded, based on the district court's flawed characterization of the other circuits' tests, that Elizabeth should win under the preexisting tests. Pet. App. 32a-33a.

## REASONS FOR GRANTING THE PETITION

Prior to this case, the circuits had articulated several conflicting tests for determining whether the IDEA requires a school district to pay for a residential placement that is required to treat a child's mental illness. *See* Pet. App. 10a-14a; *Richardson Indep. Sch. Dist*. v. *Michael Z*., 580 F.3d 286, 298-99 & n.8 (5th Cir. 2009). The Tenth Circuit has now fractured the circuits even further by adopting an entirely new test. Pet. App. 18a-20a. The differences between these tests are far more than merely semantic—they expand school districts' responsibilities beyond edu-

cation, imposing significant financial obligations at a time when school districts can ill-afford financial costs unrelated to education. A school district's obligation to pay for a private residential placement—like Elizabeth's $9,800 per month placement at Innercept—often turns on which test is used. Indeed, cases with materially indistinguishable facts have come out differently in different circuits. *Compare* Pet. App. 1a-35a (case below), with *Ashland Sch. Dist*. v. *E.H*., 587 F.3d 1175 (9th Cir. 2009). Had the Tenth Circuit properly applied the District's proffered test in this case, the outcome would have been different.

The Court should grant certiorari to establish uniformity in this important area of the law.

## I. THE QUESTION PRESENTED HAS DIVIDED THE CIRCUITS.

### A. Four Circuits Allow Reimbursement For A Residential Placement Whenever The Child's Educational Needs Are Inextricably Intertwined With Her Mental Health Problems.

Several circuits have adopted an extraordinarily broad test for residential placements necessitated by mental health issues. Drawing from the Third Circuit's decision in *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), these circuits have held that a child's private placement must be publicly funded whenever the child's educational needs are inextricably intertwined with her mental health problems. *See Kruelle*, 642 F.2d at 693-694. In other words, those circuits require public school districts to fund a residential placement as long as

the placement confers some educational benefits—regardless of the reason for the placement.

The Second Circuit's decision in *Mrs. B.* v. *Milford Board of Education*, 103 F.3d 1114 (2d Cir. 1997), is illustrative. In that case, the parent had asked a state social services agency to arrange a residential placement for her emotionally disturbed child. 103 F.3d at 1117. At that facility, the child received both treatment for her mental illness and educational services. The child's home school district initially paid only for the educational component of the placement, but the parent sought reimbursement for the entire cost of the placement. The Second Circuit sustained the parent's claim, holding that reimbursement for institutionalization is proper as long as "the child's emotional problems prevent the child from making meaningful educational progress." *Id*. at 1122. The cost of residential mental health treatment, in other words, must be covered by the school district if the child's learning difficulties are caused in part by her mental health issues.

The Sixth Circuit has taken a similar approach. In *Tilton* v. *Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), the court ordered a local school district to take over a day treatment program after the state's Department of Human Resources closed it for budgetary reasons. The school district argued that it was not responsible for those costs because the program was not an educational placement under the IDEA. 705 F.2d at 802-03. But the Sixth Circuit disagreed, holding that "[a]ny attempt to distinguish academics from treatment when defining 'educational placement' runs counter to the clear language of the Act." *Id*. at 803. The Sixth Circuit reaffirmed that broad interpretation of the IDEA

in later cases. *See, e.g.*, *Babb* v. *Knox Cnty. Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992) (school district had to pay for placement at psychiatric hospital because the "concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of 'treatment' "); *Clevenger* v. *Oak Ridge Sch. Bd.*, 744 F.2d 514, 515-16 (6th Cir. 1984) (residential placement was proper because child's "inability to cooperate with authority" impeded his learning).

The Eighth Circuit, too, has followed this approach. In *Independent School District No. 284* v. *A.C.*, 258 F.3d 769, 777 (8th Cir. 2001), the court expressly rejected a narrower test endorsed by the Seventh Circuit (discussed below), and ordered a school district to pay for an emotionally disturbed child's residential placement necessitated by the child's drug use, truancy, and suicide attempts. 258 F.3d at 771-72, 777. The Eighth Circuit explained that the controlling determination is "not whether the problem itself is 'educational' or 'noneducational,' but whether it needs to be addressed in order for the child to learn." *Id.* at 777.

Finally, the D.C. Circuit has sided with this approach and has upheld an award of reimbursement for the residential placement of a child with significant emotional problems. *McKenzie* v. *Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985). The court held that the reimbursement inquiry turns on " 'whether the residential placement is a response to medical, social, or emotional problems that are segregable from the learning process.' " 771 F.2d at 1534 (quoting *Kruelle*, 642 F.2d at 693). Because the child's mental health issues affected his ability to learn in that case, the

child's "educational and emotional needs could not be segregated." *Id*. at 1535. Reimbursement was accordingly proper for the residential placement. *Id*.

### B. Two Circuits Allow Reimbursement Only If The Residential Placement Is Necessary Quite Apart From The Child's Mental Health Needs.

The Ninth Circuit was the first court to question the extraordinarily broad liability imposed by its sister circuits. In *Clovis Unified School District* v. *California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) (per curiam), the court confronted a case in which a child's parent sought reimbursement for the child's placement at a psychiatric hospital where she also received educational services. The court denied reimbursement, expressly distinguishing between a child's education (which is publicly funded) and his treatment (which is not). As the court explained, it is not sufficient to say that a child cannot learn until her physical and mental health conditions are addressed. A child who must be maintained on kidney dialysis, for example, "certainly cannot physically benefit from education to the extent that such services are necessary to keep him alive." 903 F.2d at 643. But that does not mean that school districts must pay for the dialysis: "it is not the responsibility of the school district to provide such maintenance care." *Id*.

The *Clovis* court specifically "reject[ed] the line of reasoning" embraced by other circuits, which had held that when a child's medical, social, or emotional problems require hospitalization and are "intertwined" with the child's educational needs, the states must pay for the entire cost of the placement. *Id*. at

644. Instead, in the Ninth Circuit's view, the "analysis must focus on whether [the child's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Id*. In the case before it, the residential placement was not reimbursable because it was necessary "quite apart from" the learning process. Although the child might have been entitled to funding from a social service agency, the IDEA did not make the school district, a local educational agency, the responsible agency. *Id*. at 647.

The *Clovis* formulation does not ask whether the treatment might improve the child's educational prospects, the core inquiry of the inextricably intertwined test. In fact, it concedes that the child's educational prospects will be improved by the treatment just as a child's educational prospects would be better with kidney dialysis than without. It asks instead whether the treatment, like kidney dialysis, would be necessary if education was not a consideration, that is, was the placement necessary for reasons quite apart from education.

The Ninth Circuit reaffirmed the *Clovis* test in *Ashland School District* v. *E.H*., 587 F.3d 1175 (9th Cir. 2009)—a case with practically identical facts to this one. In that case, the child's treating physicians and therapists had recommended residential treatment to address the child's persistent emotional and medical problems. 587 F.3d at 1179. The child's family notified the school district that they were searching for a residential facility. *Id*. Then, without notice and without indicating any dissatisfaction with the school district's services, the parents trans-

ferred the student to an out-of-state private residential facility that, like Innercept, provided both medical and educational services. *Id*. at 1179-80. During the first six months at the facility, the child "was in no condition to devote much time or effort to schoolwork." *Id*. at 1185. The court accordingly denied reimbursement under *Clovis* because the residential placement was necessary quite apart from the learning process. *Id*. at 1184.

The Third Circuit also has agreed with this approach and denied reimbursement on the ground that a residential placement was necessary notwithstanding the child's educational needs. In *Mary T.* v. *School District of Philadelphia*, 575 F.3d 235, 239 (3d Cir. 2009), the court confronted a case involving a student who had been placed at a residential treatment facility to address psychiatric disorders, where she also received educational services from the school district in which the facility was located. The plaintiffs argued that "services focused on behavior modification and her emotional wellness [could] be considered educational in this context." 575 F.3d at 243. But the Third Circuit disagreed, responding in terms that echo *Clovis*: "[N]ot all services that can be broadly construed as educational are cognizable under IDEA. This is because ultimately any life support system or medical aid can be construed as related to the child's ability to learn." *Id*. at 244 (internal quotation marks omitted). The court noted that while stabilizing the child's psychiatric condition certainly "would ultimately render her more amenable to educational services," such stabilization was not the responsibility of the school district. *Id*. at 248. The court denied reimbursement because the child's admission to the treatment facility "was necessitated, not by a need for special education, but

by a need to address [the child's] acute medical condition." *Id*. at 245.

### C. Two Circuits And A State Supreme Court Allow Reimbursement Only If The Residential Placement Is Primarily Oriented Toward Enabling The Child To Obtain An Education.

The Fifth and Seventh Circuits have modified the Ninth Circuit's *Clovis* test. In *Richardson Independent School District v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009), the parents unilaterally sent a student with mental health issues to a residential treatment center that had an on-site public charter school. The district court awarded reimbursement based on the inextricably intertwined test. But the Fifth Circuit rejected that test. As the court of appeals explained, that test "expands school district liability beyond that required by IDEA" because it requires courts to "undertake the Solomonic task of determining when a child's medical, social, and emotional problems are segregable from *education*." 580 F.3d at 299. The IDEA "ensures that all disabled children receive a meaningful education, but it was not intended to shift the costs of treating a child's disability to the public school district." *Id*. at 300.

In lieu of the inextricably intertwined test, the Fifth Circuit adopted its own test. In order for a residential placement to be reimbursable under the IDEA, the court held, the placement must be: (1) "essential in order for the disabled child to receive a meaningful educational benefit," and (2) "primarily oriented toward enabling the child to obtain an education." *Id*. at 299. Unlike the inextricably intertwined test, the Fifth Circuit's test was not satisfied

merely because the placement might improve the child's educational prospects. It assumed that the child's educational prospects will be improved by the underlying treatment, but made clear that the school district is not responsible for the cost of the placement unless the placement was primarily driven by the child's educational needs. *Id*. at 300.

The Seventh Circuit has embraced a similar position. In its first extensive decision, *Butler* v. *Evans*, 225 F.3d 887 (7th Cir. 2000), that court relied heavily on the Ninth Circuit's Clovis opinion. The following year, the Seventh Circuit further clarified its position. *Dale M*. v. *Board of Education*, 237 F.3d 813 (7th Cir. 2001), involved the residential placement of a child with depression, substance abuse issues, and conduct disorder. 237 F.3d at 814, 817. The court denied reimbursement, stating: "The essential distinction is between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in non-educational activities." *Id*. at 817. When a student's problems are "not primarily educational," reimbursement for a residential placement must be denied. *Id*.

The Wisconsin Supreme Court has adopted the same focus on the reason for the residential placement. In *Calumet County Department of Human Services* v. *Randall H*., 653 N.W.2d 503 (Wis. 2002), a local court had determined that state child protection laws required the child to be placed in a residential facility. The court then imposed certain payment obligations on the child's father. The father sought relief from those obligations, arguing that the school district was responsible for the cost of the residential placement under the IDEA. But the Wisconsin

Supreme Court disagreed. Applying the Seventh Circuit's decision in *Butler*, then-Justice Sykes, writing for the court, concluded that the residential placement was not reimbursable. The child's placement was "necessitated not by his educational needs, but, rather, his mental illness." 653 N.W.2d at 510. Under the circumstances, IDEA reimbursement would be improper. *Id*.

This extreme divergence in the circuits has a huge practical effect. Depending on nothing more than where a student's school district is located, different outcomes will occur. Had Elizabeth lived in Illinois or Texas, she would have lost, and the court would have asked whether the primary orientation of her placement at Innercept was educational. Had Elizabeth lived in Tennessee or Iowa, she would have won, and the court would have asked entirely different questions (such as whether her mental health issues and her educational needs were inextricably intertwined or severable). And had she lived in California or Hawaii, she would have lost, and the court would have asked a third set of questions (whether a residential placement was necessary quite apart from her educational needs). Such a regime is intolerable under a uniform federal statute.

## II. CERTIORARI IS NECESSARY FOR UNIFORMITY IN THIS CRUCIAL AREA OF LAW.

The deep conflict among the circuits on an issue of serious importance to states and school districts across this nation meets this Court's certiorari standard. *See* S. Ct. R. 10(a). And that is particularly true because the Tenth Circuit in this case has now "stirr[ed] the pot" by adding a new test to this

already confusing mix. Pet. App. 33a (Gorsuch, J., concurring in the judgment). In the Tenth Circuit's view, the text of the IDEA establishes a four-part test for determining whether a residential placement is appropriate. Pet. App. 18a-20a. That test "shares much in common with but also differs from the copious competing tests already circulating among circuit courts." Pet. App. 33a (Gorsuch, J., concurring in the judgment).

The second and third prongs of the Tenth Circuit's test are particularly problematic. The second prong asks whether "the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable." Pet. App. 18a. This requirement distinguishes the Tenth Circuit's test from the inextricably intertwined test. *Cf.*, *e.g.*, *Babb*, 965 F.2d at 109 (ordering reimbursement for student placed at psychiatric hospital). It also brings the Tenth Circuit's test in conflict with this Court's decision in *Florence County School District* v. *Carter*, 510 U.S. 7 (1993), which held that reimbursement is not "necessarily barred by a private school's failure to meet state education standards." 510 U.S. at 14.

The third prong focuses on whether "the private placement provides special education, *i.e.*, 'specially designed instruction * * * to meet the unique needs of a child with a disability.' " Pet. App. 18a-19a. As long as the facility provides such instruction, it is a proper educational placement under the IDEA. That is far too expansive a test. Many children are admitted to hospitals for medical conditions that would have some impact on education if not treated. The Tenth Circuit would require school districts to pay for those hospital stays as long as the hospitals have state-approved educational programs.

This case provides a perfect example of the problems with such a test. Using this third prong, the Tenth Circuit brushed aside the District's contention that Elizabeth "would have required mental health services regardless of whether she was receiving educational services." Pet. App. 24a. The District had relied on the Ninth Circuit's test to argue that Elizabeth's placement at Innercept, like a student facing an emergency appendectomy or a child institutionalized with an eating disorder, was necessary for reasons quite apart from education. But the court of appeals considered that to be irrelevant. In the court of appeals' view, reimbursement was required simply because Innercept provided special education and related services to Elizabeth. Pet. App. 23a. As long as a facility can satisfy that low bar, it can be considered a proper educational placement under the Tenth Circuit's test.

Had the Tenth Circuit applied the proper, restrictive Ninth Circuit test, the result would have been different. Indeed, as noted above, the facts in this case are nearly identical to those in *Ashland School District* v. *E.H.*, 587 F.3d 1175 (9th Cir. 2009). Yet the Tenth Circuit, applying its own test, came to the opposite conclusion. That is precisely the sort of division among the circuits that this Court regularly grants certiorari to resolve.

The question presented is vitally important for children and school districts across the nation. As the U.S. Department of Education has noted, more and more children with disabilities are enrolled in private residential programs each year. Memorandum from Patricia J. Guard, Acting Director, Office of Special Education Programs, U.S. Dep't of Educ., to State Directors of Special Education (Mar. 17, 2005).

Those placements are enormously consequential for the children and enormously costly for the school districts. There is no doubt that many children benefit from placements at exclusive residential facilities. At the same time, many of those placements, including Elizabeth's, cost more than $100,000 per student per year. *Id*. Given the stakes, few educational decisions are as significant as whether a public school district must pay for a private residential placement.

Yet despite the significance of these issues, there is no settled standard for determining when a residential placement is appropriate. The confusion is so pronounced that it has drawn the attention of commentators. *See, e.g*., Ralph D. Mawdsley, *Applying the* Forest Grove *Balancing Test to Parent Reimbursement for Placement in Residential Medical Facilities*, 253 Ed. Law Rep. 521, 534 (2010) (describing the different tests and noting that they are "likely to produce different outcomes because they are based on different assumptions"). And the uncertainty leads to litigation, which compounds the already heavy costs borne by parents and school districts. New York City, for example, has incurred millions of dollars in legal fees in connection with tuition reimbursement cases. *See* Brief of the Council of the Great City Schools as *Amicus Curiae* at 23-24, *Forest Grove Sch. Dist. v. T.A*., 557 U.S. 230 (No. 08-305). And parents who believe their child is entitled to a residential placement often must enroll their child in such a program " 'at their own financial risk' "—a risk that falls most heavily on those who are least financially secure. *Carter*, 510 U.S. at 15 (citation omitted).

This uncertainty subverts the "cooperative process * * * between parents and schools" that is at the

"core" of the IDEA. *Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005). The Court should grant certiorari to establish uniformity in this important area of the law.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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